RWQCB should not adopt the tentative CAO because it contravenes Water Code 13260 by specifying the design or manner of compliance.

CALIFORNIA CODES
CALIFORNIA WATER CODE
Division 7. WATER QUALITY
Chapter 5. ENFORCEMENT AND IMPLEMENTATION
Article 6. General Provisions Relating to Enforcement and Review
§ 13360.

(a) **No waste discharge requirement or other order of a regional board** or the state board or decree of a court issued under this division **shall specify the design, location,** type of construction, **or particular manner in which compliance may be had** with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.

Requests and Recommendations

1. That the Board reject the tentative CAO, after all the City litigation seeks much of the same relief;
2. That the Board apply similar standard for area's culverts, either allow them or reject them;
3. That the board name all other dischargers, including the City of Poway, because of storm waters and sediment migration – some of the very reasons for which the Moritzes are held to account;
4. Alternatively, that the Moritzes be give a waiver of WDRs, via Water Code section 13267 or otherwise;
5. Also alternatively, that the board consider economics – the worst recession in decades – and the dischargers' resources, and put off the deadlines for a period of years to allow for equity re-growth and ability to perform work;
6. That the board encourage the City to allow Bill Moritz to install erosion control – seeding of his property via a tractor to minimize costs and stabilize the site

End

Appendix H

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Attorneys for alleged Dischargers, William and Lori Moritz

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE SAN DIEGO REGION

IN THE MATTER OF: THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AS TO TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2008-0152, v. WILLIAM MORITZ, and LORI MORITZ	WILLIAM AND LORI MORITZ'S EVIDENTIARY OBJECTIONS FOR CONSIDERATION BY RWQCB AS TO CAO R9-2008-0152 Date of RWQCB Hearing: February 11, 2009

William ("Bill") Moritz and Lori Moritz submit the following Evidentiary Objections for Consideration by the California Regional Water Quality Control Board for the San Diego Region (hereinafter "RWQCB") as to tentative Cleanup and Abatement Order ("CAO") R9-2008-0152.[1]

REQUESTED RELIEF

1. Exclusion of RWQCB's hearsay evidence, including the City of Poway's complaint; and
2. Exclusion of evidence obtained from warrantless searches.

[1] On January 26, 2009, RWQCB moved the January 28, 2009 deadline to January 30, 2009.

FACTUAL BACKGROUND

The RWQCB relies in part on allegations set forth in the City of Poway's complaint. But the allegations are hearsay, not within any hearsay exception. The City of Poway's complaint should be excluded by virtue of California Government Code section 11513 and California Evidence Code section 1200.

The RWQCB relies in part on evidence gathered from City of Poway warrantless searches, evidence that ought to be excluded.

Administrative searches generally require search warrants. *Los Angeles Chemical Co. v. Superior Court* (1990) 226 Cal. App. 3d 703, 715-716 (affirming suppression of evidence in felony trial where fire department and health services inspectors seized evidence during warrantless administrative inspection of chemical company facility). The constitutional prohibition against unreasonable searches and seizures applies to administrative inspections as well as to police searches of individuals and private homes. *Camara v. Municipal Court of the City and County of San Francisco* (1957) 387 U.S. 523, 534. Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants; that warrants are unfeasible; or that inspection programs could not function under reasonable search warrant requirements. *Id.* at 531-33. *Camara* involved the inspection of a residential apartment dwelling.

The California Legislature codified the United States Supreme Court's *Camara* decision in California Code of Civil Procedure sections 1822.50 et seq., which provides for the issuance of administrative inspection warrants. *People v. Firstenberg* (1979) 92 Cal.App.3d 570, 583.

The constitutionality of a search is determined by whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable government intrusion. *People v. Chapman* (1984) 36 Cal. 3d 98, 106. A private area for this purpose includes homes, enclosed backyards, and a home's curtilage. *See Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 177; *Viadurri v. Superior Court of San Diego County* (1970) 13 Cal.App.3d 550, 553; and *People v. Cook* (1985) 41 Cal.3d 373, 385.

The RWQCB conduct a warrantless search on June 9, 2008. Evidence obtained from that warrantless search should be excluded. The Moritzes' property is surrounded by private roads, one of which, Crocker Road, has no trespassing signs. The Moritzes had a reasonable expectation of privacy. But RWQCB conducted a warrantless search nonetheless. No exigent circumstances were present to justify a warrantless search. RWQCB could have, and should have, obtained an inspection warrants pursuant to California Civil Code section 1822.50.

The RWQCB also relies on the City of Poway's multiple warrantless administrative inspections of the Moritz property. Such evidence should be excluded.

Evidence obtained by administrative personnel during an unconstitutional search of residential property may not be used in a criminal trial. *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550, 552-554 (marijuana plant seen by Department of Agriculture pest inspector during warrantless inspection of defendant's fenced backyard was not admissible as evidence in criminal trial because search was illegal). The exclusionary rule is the remedy that allows the individual to enforce his or her rights when the government transgresses the constitutional limits on administrative inspections.

Evidence obtained during an unconstitutional administrative search should also be excluded in a civil suit seeking to decree and abate a condition of property as a statutory and common law nuisance. *See City and County of San Francisco v. City Inv. Corp.* (1971) 15 Cal.App.3d 1031, 1039 (objection to admission of evidence in civil nuisance abatement trial was heard but properly overruled when evidence of remains of a fire-gutted building were in plain view).

The United States Supreme Court, in *U.S. v. Janis* (1976) 428 U.S. 433, held that application of the exclusionary rule in civil proceedings is determined on a case-by-case basis. (*Id.* at 446.) The Court, recognizing that the rule excluding evidence obtained in violation of the Fourth Amendment is designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than personal constitutional rights of the party aggrieved, held that a determination of whether the exclusionary rule should be applied in a civil proceeding involves a balancing test weighing the deterrent effect of application of the rule against the societal costs of exclusion, as well as the effect on the integrity of judicial process. The court recognized that it had never applied the exclusionary rule to

exclude evidence from a civil proceeding, federal or state, although it acknowledged that it has applied the exclusionary rule to civil forfeiture proceedings, characterizing such proceedings as "quasi-criminal." (*Id.* at 447 n.17.) The court, nevertheless, did not explicitly rule out applicability of the rule to civil proceedings which were not "quasi-criminal." The court suggested that a determinative factor is whether the searching government official has any responsibility or duty to, or agreement with, the sovereign seeking to use the evidence, stating that in the absence of such agreement or duty, suppression of the evidence seized may not be warranted. (Id. at 448.)

The United States Supreme Court in *INS v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1034, applied the balancing test announced in *United States v. Janis*, 428 U.S. 433, whereby the likely social benefits of excluding unlawfully obtained evidence are weighed against the likely costs, and found the balance comes out against applying the exclusionary rule in civil deportation proceedings, where the sole issues are identity and alienage. However, the Court expressly left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." (*Id.* at 1050-51.) The Ninth Circuit has since "t[aken] up the Supreme Court's suggestion" and "held that, even in administrative proceedings in which ... the exclusionary rule [does not ordinarily apply], administrative tribunals are still required to exclude evidence that was obtained by 'deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution.'" *Lopez-Rodriguez v. Mukasey* (9th Cir. 2008) 536 F.3d 1012, 1018-19 (holding that exclusionary rule applies in deportation proceedings where INS agents violated the Fourth Amendment deliberately or by conduct that a reasonable officer should have known would violate the Constitution when they entered the petitioner's home without a warrant).

Like its federal counterpart, the California Supreme Court has held that application of the exclusionary rule in civil proceedings should be determined on a case-by-case basis. *In re Conservatorship of Susan T.* (1994) 8 Cal.4th 1005. Following the United States Supreme Court precedent, the California Supreme Court applies a balancing test to determine whether application of the exclusionary rule would deter the type of misconduct alleged in the case, with the social costs of

applying the rule to civil proceedings, as well as the effect on the integrity of the judicial process. (*Id.* at 1018-19.) The Court announced in *Susan T.*: "The deterrent value of the rule is at its greatest when the fruits of the search will be required in evidence at a proceeding to which the rule applies." (Ibid.) *Susan T.* decided only that the exclusionary rule does not apply in conservatorship proceedings, because the purpose of the rule—deterring future unlawful police conduct—is not served in the context of such cases. A mental health worker's concern is focused on protecting the potential conservatee, not on gathering evidence to secure a conviction. Not only would the deterrent effect of applying the exclusionary rule in conservatorship proceedings be marginal at best, application of the rule would frustrate the purposes of evaluating and treating gravely disabled persons. (*Susan T.* at p. 1019.)

Courts in California have applied the exclusionary rule in a variety of civil contexts including administrative disciplinary proceedings [*Dyson v. State Personnel Bd.* (1989) 213 Cal.App.3d 711, 721 (concluding that the deterrent effect of exclusionary rule weighed in favor of its application to a disciplinary proceeding against counselor in juvenile facility)], replevin actions [*Kohn v. Superior Court* (1936) 12 Cal.App.2d 459, (writ issued to restrain inspection of illegally obtained private documents as an unauthorized exercise of judicial power in a replevin action otherwise cognizable by the respondent court)] and civil narcotic commitment hearings [*People v. Bourdon* (1970) 10 Cal.App.3d 878 (finding exclusionary rule respecting evidence seized as a result of an arrest without probable cause applies to civil narcotic commitment hearings)].

Admittedly courts in California have also declined to apply the exclusionary rule in civil proceedings including DMV administrative proceedings to revoke a drivers license [*Park v. Valverde* (2007) 152 Cal.App.4th 877, 887 (concluding that the deterrent effect of exclusionary rule was outweighed by responsibility of DMV to get drunk drivers off the road to protect society at large)] and administrative disciplinary proceedings [*Governing Board v. Metcalf* (1974) 36 Cal.App.3d 546, (finding protection of children from teacher convicted of engaging in an act of prostitution outweighed any deterrent effect on government officials from engaging in lawless conduct)].

In *Dyson v. State Personnel Bd., supra*, 213 Cal.App.3d at 722, the court held that the exclusionary rule applied to preclude admission in an administrative disciplinary proceeding of evidence

unconstitutionally seized (U.S. Const. Amend. IV) from a juvenile counselor's home by an agency peace officer searching for evidence of theft of the agency's property. The court found that the evidence seized was in no way the independent work product of police work, where: (1) the search was initiated on the basis of allegations of criminal misconduct made to the agency; (2) the search was directed by, and the evidence was seized and held by the agency; and (3) the agency turned the evidence over to prosecutorial authorities for use in a criminal prosecution, retrieved it following its suppression by the court in the criminal proceeding, and introduced it in evidence in the administrative disciplinary proceeding.

In other states, courts have concluded that the exclusionary rule applies in civil nuisance abatement actions. *U.S. v. Phoenix Cereal Beverage Co.* (2d Cir. 1933) 65 F.2d 398 (holding judgment suppressing evidence obtained in illegal search and seizure was without bearing in later equity nuisance abatement suit, except to require exclusion of all evidence obtained in illegal search and seizure); *Carson v. State* (Ga. 1965) 144 S.E.2d 384 (evidence seized pursuant to deficient warrant must be excluded in a proceeding to abate public nuisance); *Carlisle v. State ex rel. Trammell* (Ala. 1964) 163 S.E.2d 596 (same); and *Jefferson Parish v. Bayou Landing Ltd., Inc.* (La. 1977) 350 So.2d 158 (holding evidence seized by sheriff's office in unlawful search was not admissible in an action to abate an enjoin a nuisance of obscenity alleged to exist at a bookstore).

Here the RWQCB should apply the exclusionary rule to exclude evidence unlawfully obtained by the RWQCB and by the City. Inspections without warrants where warrants are required violate the the Fourth Amendment. See e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d at 1019. Courts have long held that administrative inspections of property and residential property, in particular, require search warrants and the City's inspectors should have known their conduct was in violation of the Constitution. *See Camara v. Municipal Court, supra,* 387 U.S. at 534 (inspections of apartment dwellings); *Los Angeles Chemical Co. v. Superior Court, supra,* 226 Cal.App.3d at715-716 (inspections of chemical facilities); *Viadurri v. Superior Court, supra,* 13 Cal.App.3d at 552 (inspections of residential backyards).

RWQCB and the City of Poway violated the Moritzes' Fourth Amendment rights by inspecting their residential property without first obtaining inspection warrants. Where the proceeding, although

"civil" in nature, is "quasi-criminal" in effect, i.e. where it involves penalties or forfeitures as is potentially the result in this administrative proceeding, the exclusionary rule is applied. *United States v. Jannis*, 428 U.S. 433, 447 n.17.) A proceeding to forfeit a vehicle used in illegal transportation of narcotics is not a criminal action, but its close identity to the aims of law enforcement makes the exclusionary rule applicable. *One 1958 Plymouth Sedan v. Pennsylvania* (1965) 380 U.S. 693. The RWQCB, once it has obtained its sought-after Cleanup and Abatement order, can then pursue penalties of thousands of dollars for noncompliance with the terms of the order.

The RWQCB's administrative proceeding is "quasi-criminal" in effect, and RWQCB consequently ought to exclude evidence from warrantless administrative searches.

Dated: January 29, 2009

THE SIMPSON LAW FIRM,
A Professional Corporation
Attorneys for Bill and LoriMoritz

By: Douglas J. Simpson

PROSECUTION TEAM
EVIDENTIARY OBJECTIONS

The Prosecution Team objects to the inclusion of "deposition transcript testimony" set forth in the Moritz Argument. The Argument contains numerous excerpts from depositions of Mr. Christopher Means and City of Poway employees. They are taken from draft transcripts prepared for depositions that were held during the week of January 19, 2009. The final, certified transcripts are not yet available. With respect to Mr. Means' deposition testimony, it is the Prosecution Team's position, that the excerpts used are subject to validation by means of the final certified transcript. With respect to the City of Poway employee deposition transcripts, the excerpts should be stricken from the record of this proceeding entirely. First, the Prosecution Team did not attend those depositions, and thus, we have no independent knowledge of the reliability of the draft transcripts. Second, we made no stipulations with Moritz allowing their use in this proceeding.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
FOR THE SAN DIEGO REGION

IN THE MATTER OF: THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AS TO TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2008-0152, v. WILLIAM MORITZ, and LORI MORITZ	WILLIAM AND LORI MORITZ'S REPLY TO RWQCB'S EVIDENTIARY OBJECTIONS Date of RWQCB Hearing: February 11, 2009

William ("Bill") Moritz and Lori Moritz submit the following Evidentiary Objections for Consideration by the California Regional Water Quality Control Board for the San Diego Region (hereinafter "RWQCB") as to tentative Cleanup and Abatement Order ("CAO") R9-2008-0152.[1]

REQUESTED RELIEF

1. Deny RWQCB Prosecution Team's request to exclude deposition excerpts.
2. In the alternative, add an additional two hours to the existing one hour of the Moritzes' presentation time so that witnesses can be subpoenaed and cross examined at a hearing.

[1] On January 26, 2009, RWQCB moved the January 28, 2009 deadline to January 30, 2009.

FACTUAL BACKGROUND

At the deposition of Christopher Means, RWQCB's prosecution team's attorney, Jorge Leon, was invited to attend City-witness depositions, but he declined the invitation. He should not now be heard to complain of his absence. Mr. Leon was provided with rough-draft copies of the deposition testimony when received last week.

Furthermore, together with this reply, the RWQCB prosecution team is being provided with currently available certified, but as yet unsigned, transcripts. California Government Code section 11513 permits the inclusion of such evidence because it is relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. After all, the witnesses were sworn in, and told that the penalty of perjury applied to the testimony being given. They testified voluntarily, and in the presence of their own attorney. The transcript cannot be seriously questioned, and is reliable

Alternatively, Government Code section 11513 permits the Moritzes to call and to examine witnesses. By truncating the presentation of evidence to a single hour, the Moritzes are effectively being deprived of the right of due process and that the rights guaranteed under California Government Code section 11513. Consequently, if deposition testimony is ruled inadmissible, the Moritzes request an additional two hours so that witnesses may be subpoenaed and cross examined at the hearing of this matter.

Dated: January 30, 2009

THE SIMPSON LAW FIRM,
A Professional Corporation
Attorneys for Bill and LoriMoritz

By: Douglas J. Simpson

From: Catherine Hagan (George)
To: dsimpson@simpsonlawfirm.com; Jorge Leon;
Subject: Moritz Matter, Tentative CAO R9-2008-0152
Date: Tuesday, February 03, 2009 12:17:47 PM

To the Parties:

On January 30, both parties in the above matter submitted rebuttal argument and evidentiary objections. The Parties must submit any legal arguments concerning the evidentiary objections they wish the Advisory Team to consider not later than 12:00 p.m. on Thursday, February 5. They may submit the argument by email. I note that on January 30, the Moritzes also submitted a reply to the Prosecution Team's evidentiary objections. If they wish to supplement their earlier submitted reply, they may do so within this time frame.

Thank you.

Catherine George Hagan
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
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From:	Doug Simpson
To:	"Catherine Hagan (George)"; John Robertus (jrobertus@waterboards.ca.gov);
cc:	"Mike McCann"; "Christopher Means"; "Jorge Leon"; "Lisa A. Foster"; "Brandon Vegter"; "DrBill@ShareKids.com"; "LoriMoritz"; "brossi@waterboards.ca.gov";
Subject:	Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Wednesday, February 04, 2009 10:42:00 PM

THE SIMPSON LAW FIRM

A Professional Corporation

Dear Ms. Hagan and Mr. Robertus:

We are taking the opportunity to supplement earlier evidentiary submittals.

Given the 21-megabyte size of the document, RWQCB server settings, and at the suggestion of Bob Rossi of RWQCB, I am posting this document to YouSendIt.com. Each of you will receive an email from me via that site, indicating that the document is available to you.

Should this present a problem, please advise, and I will have a copy driven to RWQCB in the morning. Otherwise, I would appreciate confirmation that this submittal method is acceptable and that the document has been received. If possible, please contact me via cell phone, as I will be in L.A. tomorrow in a mediation.

Thanks,

Doug Simpson

Doug Simpson
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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
FOR THE SAN DIEGO REGION

IN THE MATTER OF: THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AS TO TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2008-0152, v. WILLIAM MORITZ, and LORI MORITZ	WILLIAM AND LORI MORITZ'S THIRD EVIDENTIARY OBJECTIONS SUBMITTAL FOR CONSIDERATION BY RWQCB AS TO CAO R9-2008-0152 Date of RWQCB Hearing: February 11, 2009

William ("Bill") Moritz and Lori Moritz submit their Third Evidentiary Objections for Consideration by the California Regional Water Quality Control Board for the San Diego Region (hereinafter "RWQCB") as to tentative Cleanup and Abatement Order ("CAO") R9-2008-0152.[1]

REQUESTED RELIEF

1. Exclusion of all evidence obtained from warrantless searches.
2. Exclusion of RWQCB's hearsay evidence, including the City of Poway's complaint; and
3. The tentative CAO R9-2008-0152 should be withdrawn.

[1] This supplements but does not replace the Moritzes' January 29 and January 30, 2009 submittals.

ALL EVIDENCE GATHERED PURSUANT TO WARRANTLESS SEARCHES, AND THE FRUITS THEREOF, SHOULD BE EXCLUDED BECAUSE OF THE ABSENCE OF A WARRANT , OF CONSENT, AND OF EXIGENT CIRCUMSTANCES

The RWQCB's prosecution team does not deny the absence of a warrant, and makes no offer of proof to the contrary. Nowhere in the record is any evidence of RWQCB having procured a warrant, not is there any evidence of circumstances excusing its absence.

The RWQCB does not deny that it conducted an administrative search. RWQCB does not assert that exigent circumstances made its search reasonable despite the absence of a warrant. Instead, the RWQCB prosecution team relies totally on the single assertion that regional board staff's observations were made from "the road," and were thus in plain view, excusing the RWQCB of warrant requirements.

The RWQCB then relies on hearsay evidence gathered from City, as exemplified by reliance on stop-work notices, themselves hearsay evidence themselves reliant on warrantless searches, as well as on the City's Complaint. But reliance on such hearsay evidence gathered by warrantless searches is misplaced. All such evidence should be excluded, as should all the fruits of the warrantless searches — including the totality of this action because RWQCB was alerted by City only after the City's warrantless searches.

The RWQCB has not designated any City personnel who could provide non-hearsay evidence. But even if they could, the evidence still is tainted because it was procured only after warrantless searches. The Moritzes object to the admissibility of the hearsay evidence based on California Government Code section 11513 and California Evidence Code section 1200, et seq., as hearsay not within any exception. RWQCB demonstrates no hearsay exception that could make admissible hearsay evidence on which it relies, such as statements made to RWQCB that the Moritzes had dumped Phil into an ephemeral stream that precipitated RWQCB's own warrantless search. Moreover, City policy

statements, which likely will be made by city personnel, are *not* admissible as evidence and *cannot* properly be received in evidence[2] in an effort to cure any hearsay problem. Consequently, the record is devoid of admissible evidence justifying a warrantless search, and it cannot now properly be augmented to cure the defect. The tentative CAO should be withdrawn because RWQCB is without sufficient admissible evidence to justify a hearing.

RWQCB staff, Christopher Means, acknowledged that he had no warrant when he first inspected the property on June 9, 2008:

> Q Did you have an inspection warrant when you went out to my client's property on June 9, 2008?
> A No.
> Q Did Danis Bechter?
> A I don't know.
> Q Did Kelly Fisher?
> A I don't know.
> Q You guys went onto Sean Marsden's property?
> A Yes.
> [Deposition of Christopher Means at 26:9-15].

Moreover, as noted in Christopher Means' testimony, RWQCB's inspection was made from the *Marsden* property, *not* from the road as RWQCB suggests. Yet there is no evidence set forth in the record — the entirety of the RWQCB file — that RWQCB had permission or consent from the Marsden property's owner to be on that property to conduct the search.

Significantly, the only two roads leading to the Marsden's and to the Moritzes' property are *private* drives.[3] (See Attachments 1 and 2.) Crocker Road is marked with two signs stating: "PRIVATE

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[2] According to the Hearing Procedure for Tentative Cleanup and Abatement Order No. R9-2008-0152, interested parties such as the City of Poway may not present evidence: "Interested persons may present ***non-evidentiary policy statements,*** but may not cross-examine witnesses and are not subject to cross-examination." (Emphasis added.)

[3] Q. Do you have any understanding whether Jerome Drive is a private street versus a public street?
A. I believe it is a private street. But I can't say for certain.
Q. How about Crocker Road?
A. I believe that is also a private street.
[Deposition of Jim Lyon at 30:5-10 (excerpt attached as Attachment 4)].

ROAD NO TRESPASSING RESIDENTS ONLY NOT A CITY TRAIL," and "NO TRESPASSING, and one marked "Private Road." (Attachment 1.) Jerome Drive likewise is marked with a sign stating "Private Road." (Attachment 2.)

The Marsden property thus is landlocked. (See Attachment 3.) Unless an inspector arrives by helicopter, the inspector must travel over individual property owners' property before even arriving at the Marsden property, because property owners in the area own Jerome Drive and Crocker Road to the center of those two streets.[4] Of course the inspector is performing warrantless searches on all such properties as he or she traverses them. In fact, the inspector is trespassing on all such properties, because the property owners in the area own to the center of the roads, Crocker Road and Jerome Drive. (See footnotes 3 and 4.)

Thus the RWQCB, and the City inspectors who alerted RWQCB to the existence of a concern as to the Moritz property, traversed private property at the intersection of Crocker Road and Golden Sunset to the south, or, in the case of the City inspections, traversed multiple properties beginning at the intersection of Espola Road and Jerome Drive to the west. Neither RWQCB, nor the City on whose hearsay evidence RWQCB relies, had any right to be on any of those properties without a warrant or without consent. RWQCB has demonstrated neither a warrant nor consent to be on the property from which it asserts it had a "plain view" of the Moritzes' property. There is no evidence in the record to

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[4] Q Jerome Drive is a private drive, correct?
A Yes.
Q And so is Crocker?
A Yes.
Q And your property is halfway into Jerome Drive, right, on the north side?
A Halfway into Jerome Drive on the north side.
Q Your property line is down the center of Jerome Drive?
A Yeah.
Q Any likewise on the east it's halfway through Crocker Road?
A Yes.
[Deposition of Sean Marsden at 30:1-10 (Attachment 5.]

justify RWQCB personnel being where they were when they performed their purported "plain view" inspection.

Because the roads themselves are private property and are marked as such — particularly in the case of Crocker Road which is marked with *two* "no trespassing" signs, and accessible only from the south passing no signs, the Moritzes had a reasonable expectation of privacy. The Moritzes' property was fenced or was otherwise enclosed by bushes, shrubbery, trees on three sides and bounded by a neighbor's fenced property on the fourth side. As will be presented at the hearing, the Moritzes sought out this particular piece of property in part specifically because of the *privacy* that the area afforded. Certainly they have no expectation that governmental entities will travel the roads to perform inspections without notice and without warrants.

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Our state Constitution provides for similar safeguards against unreasonable searches and seizures. (Cal. Const., art. I, § 13.) Moreover, the Moritzes are citizens of the State of California, and have rights guaranteed by the California Constitution, Article I, Section 1, including the rights to protect their property, to obtain their safety, and to have privacy:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." California Constitution, Article I, Section 1.

As the Supreme Court has explained: "The touchstone of the Fourth Amendment is reasonableness. . . . The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." (*Florida v. Jimeno* (1991) 500 U.S.

248, 250 [114 L.Ed.2d 297, 111 S.Ct. 1801]; see also *Brigham City, Utah v. Stuart* (2006) ___ U.S. ___ [164 L.Ed.2d 650, 126 S.Ct. 1943, 1947].)

"[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." (*People v. Robles* (2000) 23 Cal.4th 789, 795, quoting *United States v. Karo* (1984) 468 U.S. 705, 714 [82 L.Ed.2d 530,104 S.Ct. 3296].) ***Searches and seizures conducted without a warrant consequently "are per se unreasonable under the Fourth Amendment*** [of the United States Constitution] — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States* (1967) 389 U.S. 347, 357 (emphasis added); see also *Payton v. New York* (1980) 445 U.S. 573, 586 [63 L.Ed.2d 639, 100 S.Ct. 1371].

Where the defendant establishes that the search or seizure was made without a warrant, and was prima facie unlawful, "the burden then rest[s] on the prosecution to show proper justification. *Horack v. Superior Court* (1970) 3 Cal.3d 720, 725; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 972. The fact that the government might have probable cause for their belief that items are subject to seizure does not eliminate the need for a warrant to effect a search of a residence. *Jones v. United States* (1958) 357 U.S. 493, 497 [2 L.Ed.2d 1514, 78 S.Ct. 1253]. "Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.* at p. 498.

As the United States Supreme Court explained over 50 years ago:

> "The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a

> search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Johnson v. United States* (1948) 333 U.S. 10, 13-14 [92 L.Ed. 436, 68 S.Ct. 367], fns. omitted.

The reason for this presumption that warrantless searches are unreasonable (and hence illegal) is plain: "An intrusion by the state into the privacy of the home for any purpose is one of the most awesome incursions of police power into the life of the individual. . . . It is essential that the dispassionate judgment of a magistrate, an official dissociated from the 'competitive enterprise of ferreting out crime' [citation], be interposed between the state and the citizen at this critical juncture." *People v. Ramey* (1976) 16 Cal.3d 263, 275 [127 Cal.Rptr. 629].

The fact that obtaining a warrant might be inconvenient and that proceeding in the absence of a warrant might be more efficient does not justify a warrantless search. "[T]he inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate . . . are never very convincing reasons . . . to bypass the constitutional requirement" of a warrant. *Johnson v. United States,* supra, 333 U.S. at p. 15; see also *Mincey v. Arizona* (1978) 437 U.S. 385, 393 [57 L.Ed.2d 290, 98 S.Ct. 2408] [person's privacy rights in "home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"]; *Coolidge, supra,* 403 U.S. at p. 481 [warrant requirement is valued part of constitutional law and "not an inconvenience to be somehow 'weighed' against the claims of police efficiency"].)

Thus, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York, supra,* 445 U.S. at p. 590; see also *Johnson v. United States, supra,* 333 U.S. at pp. 14-15 [warrant

required save in cases involving "exceptional circumstances"]; *People v. Ramey, supra,* 16 Cal.3d at p. 270 [warrantless searches "unreasonable per se in the absence of one of a small number of carefully circumscribed exceptions"].)

In California, administrative searches require an administrative warrant issued pursuant to California Code of Civil Procedure section 1822.50. *Gleaves v. Waters* (1985) 175 Cal. App. 3d 413. Absent exigent circumstances, ***the need to summarily abate a public nuisance does not of itself justify the government's invasion of legitimate privacy interests without consent or without a warrant.*** *Id.* at 416 (emphasis added). In *Gleaves,* agricultural control officers entered plaintiff's yard in order to abate a public nuisance. The court concluded that "entries onto private property by administrative functionaries of the government, like searches pursuant to a criminal investigation, are governed by the warrant requirement of the Fourth Amendment." *Id.* at 418, citing *Camara v. Municipal Court* (1967) 387 US 523.

Thus where there is a legitimate privacy interest in the property entered, a warrantless and nonconsensual entry is permissible only where exigent circumstances justify the intrusion. *Gleaves,* 175 Cal. App. 3d at 418. The Gleaves court noted that depending on the circumstances, a reasonable expectation of privacy might be recognized in certain areas surrounding one's home which are protected from nonexigent warrantless intrusions by governmental officers. *Id.* at 419.

The essence of a search ***is viewing that which was intended to be private or hidden. A search within the meaning of the Fourth Amendment occurs whenever one's reasonable expectation of privacy is violated by unreasonable governmental intrusion.*** Whether the government's purpose is to abate a public nuisance or to perform a routine inspection, the privacy interests of homeowners are no less affected. *Id.*

A person who surrounds his backyard with a fence, shrubbery, bushes, and trees, and otherwise limits entry has demonstrated a reasonable expectation of privacy for that backyard area. *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550. Here, the Moritz property is surrounded on three sides by fences, on the fourth side by an adjoining private and fenced property, by bushes, by trees, and by shrubbery. The Moritzes have taken reasonable measures to restrict viewing of their property from adjoining parcels because they have teenage daughters living on the property, as will be discussed at the hearing herein. Significantly, and as discussed above, the property is accessible only by private roads, each of which is marked "PRIVATE ROAD." (See Attachment 3.) Moreover, the road by which RWQCB accessed the Moritz property — Crocker Road — was marked with two "NO TRESPASSING" signs, one of which also states "RESIDENTS (*sic.*) ACCESS ONLY NOT A CITY TRAIL." (See attachment 1.) The Moritzes have shown a reasonable expectation of privacy and an expectation that they wished to be free from governmental intrusions and warrantless searches.

RWQCB's position would render meaningless the Fourth Amendment to the United States Constitution, and the California Constitution, Article I, Section 13, just as the United States Supreme Court forewarned in *Jones v. United States* (1958) 357 U.S. 493, 497. If RWQCB can tromp around citizens' property with impunity in the name of clean water, of what value are the constitutionally guaranteed rights of the Fourth Amendment and of Section 13 of Article I of the California Constitution?

Similarly, if there is no need to procure an administrative warrant pursuant to California Code of Civil Procedure section 1822.50, of what value is that code section? RWQCB's position would relegate that code section to meaningless surplusage, contrary to principles of statutory construction.

RWQCB seemingly argues for a water-quality-protection exception to the Fourth Amendment of the United States Constitution. In the name of water quality, as the argument apparently goes, RWQCB need not ever obtain a warrant.

But the Constitution makes no such distinctions. The Constitution makes no distinctions about whether government intrusions might end up in administrative civil liability as opposed to criminal prosecution. But the penalties of civil prosecution, particularly by the RWQCB with penalties that can exceed $1000 per day, are perhaps no less onerous and no less burdensome than criminal prosecution. Even misdemeanors with minimal jail time enjoy constitutional protections. Should property owners whose property, life savings, and children's college funds could be lost to liens placed by governmental entities for thousands of dollars of penalties or for cost reimbursement — as RWQCB threatened here in the Notifications section of the tentative cleanup and abatement order R9-2008-0152 — be entitled to any less protection than a person prosecuted for growing a marijuana plant, or a person who might be subject to disciplinary proceedings? Again, the Constitutions of the United States and of the State of California provide no basis for such a distinction.

The constitutional issue is whether the governmental entry — or the viewing of that as to which one enjoys a reasonable expectation of privacy — is proper in the first instance, not on what remedy the governmental entity might later choose to pursue. The entry — or viewing — in the first instance must meet constitutional guarantees of the Fourth Amendment, or the evidence gained should properly be excluded.

Admittedly excluding the evidence in this civil action could be an issue of first impression in the State of California. But we are guided by the principles set forth Constitution of the United States and of the State of California. Absent the remedy of exclusion of the evidence obtained in this civil matter, nothing would deter RWQCB from inspecting anybody's property at any time, and anywhere in the

name of water quality. Water-quality interests should not trump Constitutional guarantees to be free from governmental searches. As the United States Supreme Court has concluded, the expediency of a warrantless inspection does not justify the failure or refusal to put the evidence in front of a magistrate who can dispassionately decide whether to issue a warrant.

Nothing in the United States Constitution and nothing in the California Constitution suggests that people are entitled to less protection as against governmental intrusion where the government seeks civil versus criminal remedies. Neither the United States Constitution nor the California Constitution has an exception for government intrusions seeking a civil remedy versus a criminal, penal, or disciplinary remedy.

Just as in *Gleaves,* RWQCB here is asserting that the Moritzes created or threatened to create a nuisance. RWQCB obtained no warrant. It has no evidence in the record excusing the absence of a warrant. It can neither properly rely on hearsay[5], nor can it now call witnesses who were not listed in an attempt to cure hearsay problems. City witnesses themselves cannot present evidence; although they may speak in terms of policy; City and others' statements are to be ***non-evidentiary*** statements.

Notably, the City is effectively RWQCB's deputy in enforcing grading ordinances. The City of Poway is required to take a variety of measures pursuant to the RWQCB's order R9-2007-0001. Among other things, the City is required to have grading ordinances and erosion-control measures in place, and is subject to RWQCB liability for failures. The City of Poway thus has a practice, if not a requirement, of reporting stop-work notices to the RWQCB. The City of Poway and RWQCB thus are joined at the hip in enforcing ordinances pertaining to erosion control and grading as it affects or potentially affects water quality.

---

[55] The Moritzes object to RWQCB's reliance on City provided evidence, which is hearsay, not within any appropriate exception. The information would be excluded at trial in civil matters and should be excluded here. As provided in California Government Code section 11513 (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

CONCLUSION

The Moritzes are constitutionally entitled to be free from unreasonable governmental intrusion. They have a reasonable expectation of privacy because their property is landlocked, reasonably hidden from view, and accessible only by private roads marked as private. Moreover, in the case of Crocker Road by which RWQCB accessed the Moritz neighbor property, Crocker Road is marked with two no-trespassing signs. RWQCB has the burden of demonstrating a warrant or a proper basis for not having obtained a warrant.

The RWQCB, and the City of Poway acting in effect as RWQCB's deputy in enforcing erosion-control measures, should have subject themselves to the dispassionate judgment of a magistrate before having performing administrative inspections of property such as occurred here. The RWQCB has not and cannot carry its burden of demonstrating either an inspection warrant or a proper reason for not having sought and obtained an inspection warrant.

All evidence based on RWQCB's or on the City of Poway's warrantless searches, or hearsay evidence thereof, should be excluded. The tentative CAO should be withdrawn.

Dated: February 4, 2009

THE SIMPSON LAW FIRM,
A Professional Corporation
Attorneys for Bill and LoriMoritz

By: Douglas J. Simpson

Attachment 1

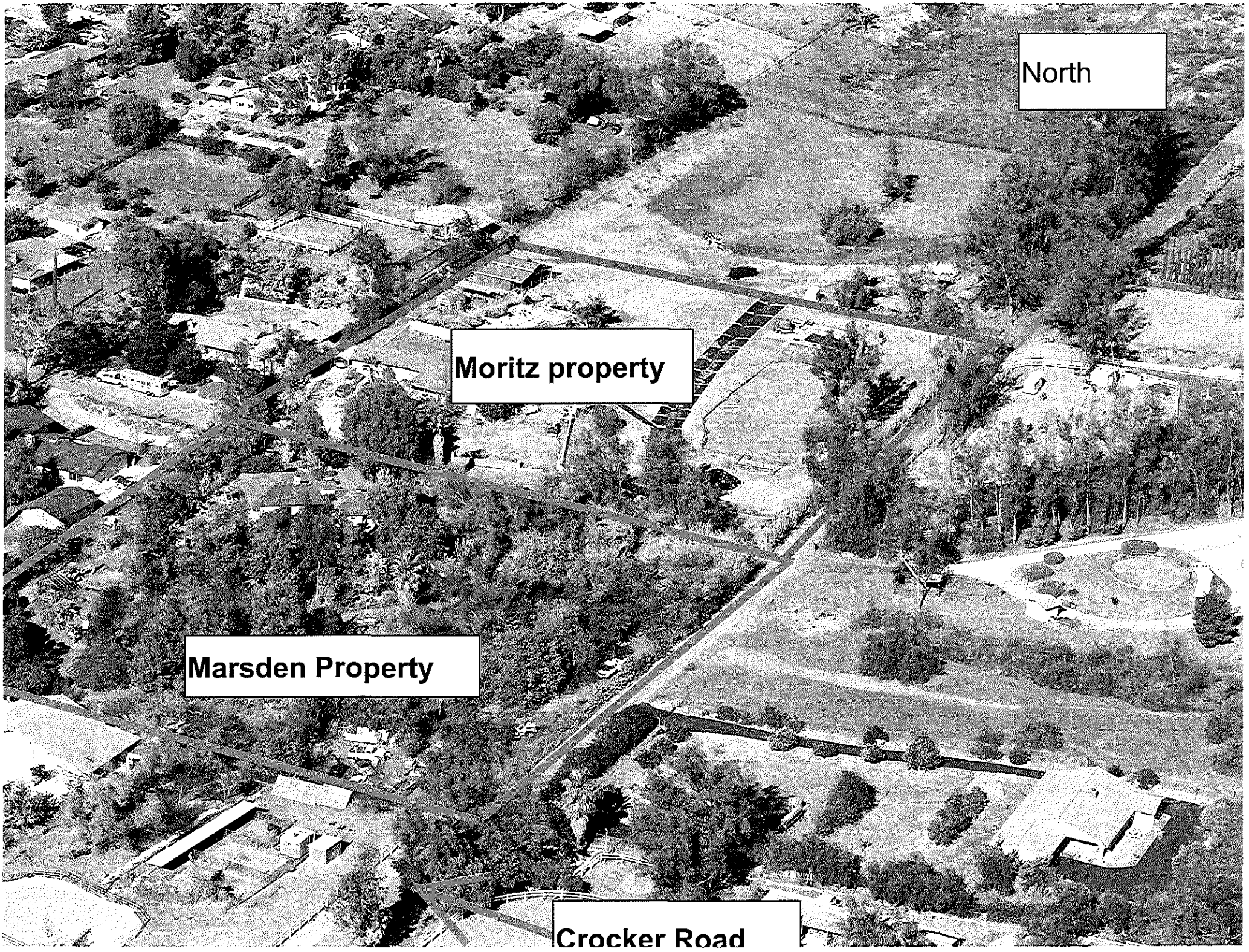
2008/11/18

2008/7/18

Attachment 2


PRIVATE
ROAD

Attachment 3


North
Moritz property
Marsden Property
Crocker Road

Attachment 4

various visiting firefighters from other jurisdictions that were helping fight the Witch Creek fires in October of 2007?

A. I have no knowledge.

Q. Do you have any understanding whether Jerome Drive is a private street versus a public street?

A. I believe it is a private street. But I can't say for certain.

Q. How about Crocker Road?

A. I believe that is also a private street.

Q. What are the colors of City of Poway Fire Department's fire engines, fire trucks?

A. Red. Fire engine red.

Q. Had to ask. Sometimes they're yellow.

To your knowledge, did Mr. Kitch ever speak with anybody to determine whether there had been a conversation about the need to extend Jerome Drive to improve access over to Crocker Road?

A. Not to my knowledge.

Q. Did you do anything other than speak to Mr. Kitch to determine whether there had been any City of Poway personnel who had made that recommendation?

A. No.

Q. Did Bill Moritz say anything about his conversations with Don Sharp before you had arrived

Attachment 5

Q Jerome Drive is a private drive, correct?
A Yes.
Q And so is Crocker?
A Yes.
Q And your property is halfway into Jerome Drive, right, on the north side?
A Halfway into Jerome Drive on the north side.
Q Your property line is down the center of Jerome Drive?
A Yeah.
Q Any likewise on the east it's halfway through Crocker Road?
A Yes.
Q That pipe, the culvert that's on the east side of your property beneath Crocker Road, there's only one, correct?
A Correct.
Q Who put that there?
A I have no idea.
Q Do you know the date that that was put in?
A No idea.
Q Any idea whether that was permitted?
A No idea.
Q To the north is another culvert, approximately a 14-inch culvert going diagonally beneath Crocker Road.

From:	Doug Simpson
To:	"Catherine Hagan (George)"; "John Robertus";
cc:	"LoriMoritz"; "Lisa A. Foster"; "DrBill@ShareKids.com"; "Brandon Vegter"; "Bob Rossi"; "Christopher Means"; "Jorge Leon"; "Mike McCann"; "bross@waterboards.ca.gov";
Subject:	RE: Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Thursday, February 05, 2009 8:37:00 AM

Dear Ms. Hagan:

On Monday, I received the invitation from you, copied below, to supplement earlier replies by noon today. The submittal is in response to that invitation.

I am mediating a case in Los Angeles today, I will copy this email message to you all shortly with the 21-megabyte file, which perhaps Mr. Rossi can retrieve as he suggested roughly ten days ago.

I would appreciate a phone call from RWQCB indicating its receipt.

Thanks,

Doug Simpson

To the Parties:

On January 30, both parties in the above matter submitted rebuttal argument and evidentiary objections. The Parties must submit any legal arguments concerning the evidentiary objections they wish the Advisory Team to consider not later than 12:00 p.m. on Thursday, February 5. They may submit the argument by email. I note that on January 30, the Moritzes also submitted a reply to the Prosecution Team's evidentiary objections. If they wish to supplement their earlier submitted reply, they may do so within this time frame.

Thank you.

-----Original Message-----
From: Catherine Hagan (George) [mailto:CHagan@waterboards.ca.gov]
Sent: Thursday, February 05, 2009 8:09 AM

To: Doug Simpson; John Robertus
Cc: 'LoriMoritz'; 'Lisa A. Foster'; DrBill@ShareKids.com; 'Brandon Vegter'; Bob Rossi; Christopher Means; Jorge Leon; Mike McCann
Subject: Re: Bill and Lori Moritz's supplemental evidentiary submittal

Mr. Simpson,
I am unable to access the document you sent by separate email. Your submittal is clearly late; the hearing procedures for this matter establish a deadline of January 23, 2009 for the Moritzes to submit written evidence and testimony. The procedures allowed the submittal of written rebuttal evidence, but that was due January 30. Please immediately explain the nature of the evidence you now seek to introduce and explain why you were unable to submit the evidence in accordance with the deadlines in the hearing procedures so that I can discuss with the Regional Board Chair whether any portion of the evidence will be allowed.

Catherine George Hagan
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
chagan@waterboards.ca.gov

****
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Telephone: 858.467.2958
Facsimile: 858.571.6972

>>> "Doug Simpson" <dsimpson@simpsonlawfirm.com> 2/4/2009 10:42 PM >>>
THE SIMPSON LAW FIRM

A Professional Corporation

Dear Ms. Hagan and Mr. Robertus:

We are taking the opportunity to supplement earlier evidentiary submittals.

Given the 21-megabyte size of the document, RWQCB server settings, and at the suggestion of Bob Rossi of RWQCB, I am posting this document to YouSendIt.com. Each of you will receive an email from me via that site, indicating that the document is available to you.

Should this present a problem, please advise, and I will have a copy driven to RWQCB in the morning. Otherwise, I would appreciate confirmation that this submittal method is acceptable and that the document has been received. If possible, please contact me via cell phone, as I will be in L.A. tomorrow in a mediation.

Thanks,

Doug Simpson

Doug Simpson

619-807-0196 (cell)

619-437-6900 ext. 201 (office direct line)

****

Doug Simpson

Direct dial: 619-437-6900, ext. 201

Fax: 619-437-6903

Cell: 619-807-0196

———

1224 10th Street, Suite 201, Coronado, California 92118

Phone: (619) 437-6900, Fax: (619) 437-6903

www.simpsonlawfirm.com

From:	Doug Simpson
To:	"Catherine Hagan (George)"; "John Robertus";
cc:	"Christopher Means"; "Mike McCann"; "Jorge Leon"; "Lisa A. Foster"; "LoriMoritz"; "DrBill@ShareKids.com"; "Brandon Vegter";
Date:	Thursday, February 05, 2009 8:47:00 AM
Attachments:	Bill and Lori Moritz"s third ...iary objections submittal.pdf

THE SIMPSON LAW FIRM

A Professional Corporation

The Moritzes' further submittal is attached.

Doug Simpson

Doug Simpson
619-807-0196 (cell)
619-437-6900 ext. 201 (office direct line)

****

Doug Simpson
Direct dial: 619-437-6900, ext. 201
Fax: 619-437-6903
Cell: 619-807-0196

From:	Jorge Leon
To:	dsimpson@simpsonlawfirm.com; Catherine Hagan (George); John Robertus;
cc:	lfoster@mclex.com; DrBill@ShareKids.com; bvegter@simpsonlawfirm.com; Christopher Means; Mike McCann;
Subject:	Re: Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Thursday, February 05, 2009 6:32:36 AM

Ms. Hagan and Mr. Robertus:

The Prosecution Team vehemently objects to Moritz' "Supplemental Evidentiary Fiing." First, there is no provision in the Hearing Notice for such a filing. The Moritz' deadline for submittal of evidence in this matter has passed. Second, Moritz has failed to provide any justification for its late and voluminous submittal. Unless Moritz is able to show good cause for this filing, it should not be admited. Third, after several attempts, I was unable to open the file, likely because of the size of the file. As I am in San Luis Obispo on another matter today and tomorrrow is a furlough day for the sate, I will likely be unable to obtain assistance from our Info Tech people to view the files until Monday (2/9). Fourth, the late, voluminous filing presents an extreme and extraordinary prejudice to the Proecution Team in that we are pressed at this late date to review Moritz' voluminous filing with very little time. Fifth, Moritz has failed to explain not only why this late filling is justified, but he has also failed to provide even a brief description of the contents so that we could determine whether or not spending the time to review would be worthwhile.

Under the circumstances, we can't help but speculate that this submittal is a thinly-veiled attempt to create a delay of the scheduled hearing by means of a massive, unexplained paper dump.

For these reasons, the Prosecution Team requests that the Advisory Team reject the filing for the reasons cited above unless Moritz by noon today (2/5) provides a brief description of the contents of the late filing and provides compelling reasons why it must be considered. Even then, if the Advisory Team decides to allow the filing, it should require that Moritz pare down the submittal to its bare essential content and resubmit so that the Advisory Team, the Prosecution Team and the Board are not unreasonably burdened by spending inordinate amounts of time reviewing the submittal.

We regret having to do so because we appreciate that the Advisory Team is busy working on all other items on the Board's agenda for February 11, but we do ask that a ruling on this be made as soon as possible.

Jorge A. Leon

Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
1001 I St., Sacramento, CA 95814
Phone: (916) 341-5180
Fax: (916) 341-5284
jleon@waterboards.ca.gov
>>> "Doug Simpson" <dsimpson@simpsonlawfirm.com> 02/04/09 10:42 PM
>>>
THE SIMPSON LAW FIRM

A Professional Corporation

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From:	Doug Simpson
To:	"Jorge Leon";
cc:	"Catherine Hagan (George)"; "Christopher Means"; "John Robertus"; "DrBill@ShareKids.com"; "LoriMoritz"; "Mike McCann"; "Brandon Vegter";
Subject:	RE: Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Thursday, February 05, 2009 8:54:00 AM

Dear Mr. Leon:

For reasons unknown to me, the advisory team allowed the parties a further opportunity to discuss evidentiary issues. We have done no more than the prosecution team by preparing a further document that we were invited to prepare. Surely the invitation was made to us both, not simply to the prosecution team?

The file size was large, but I now have saved it smaller. You should have no trouble receiving it in its 2-megabyte form. Having not seen the document, I cannot understand how you've judged that it is voluminous. Nor is that an objection that has any validity in the matter. The document that we were invited to provide should be received, made part of the administrative record, and considered.

Doug Simpson

-----Original Message-----
From: Jorge Leon [mailto:JLeon@waterboards.ca.gov]
Sent: Thursday, February 05, 2009 6:32 AM
To: dsimpson@simpsonlawfirm.com; Catherine Hagan (George); John Robertus
Cc: lfoster@mclex.com; DrBill@ShareKids.com; bvegter@simpsonlawfirm.com; Christopher Means; Mike McCann
Subject: Re: Bill and Lori Moritz's supplemental evidentiary submittal

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From:	Jorge Leon
To:	dsimpson@simpsonlawfirm.com;
cc:	LoriMoritz@cox.net; DrBill@ShareKids.com; bvegter@simpsonlawfirm.com; Catherine Hagan (George); Christopher Means; John Robertus; Mike McCann;
Subject:	Re: Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Thursday, February 05, 2009 9:01:29 AM

If the "document" is related to the evidentiary objection issues, as limited by Ms. Hagan's ruling, it would perhaps be allowed. If however, it constitutes further factual evidence, it should be rejected. I have no way of knowing as I can't open it on the blackberry.
-----Original Message-----
From: "Doug Simpson" <dsimpson@simpsonlawfirm.com>
Cc: LoriMoritz <LoriMoritz@cox.net>
Cc: <DrBill@ShareKids.com>
Cc: Vegter', 'Brandon <bvegter@simpsonlawfirm.com>
Cc: Means, Christopher <CMeans@waterboards.ca.gov>
Cc: Robertus, John <JRobertus@waterboards.ca.gov>
Cc: McCann, Mike <MMcCann@waterboards.ca.gov>
Cc: Hagan (George), Catherine <CHagan@waterboards.ca.gov>
To: Leon, Jorge <JLeon@waterboards.ca.gov>

Sent: 2/5/2009 8:54:27 AM
Subject: RE: Bill and Lori Moritz's supplemental evidentiary submittal

Dear Mr. Leon:

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Subject: Re: Bill and Lori Moritz's supplemental evidentiary submittal

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The Prosecution Team vehemently objects to Moritz' "Supplemental Evidentiary Fiing." First, there is no provision in the Hearing Notice for such a filing. The Moritz' deadline for submittal of evidence in this matter has passed. Second, Moritz has failed to provide any justification for its late and voluminous submittal. Unless Moritz is able to show good cause for this filing, it should not be admited. Third, after several attempts, I was unable to open the file, likely because of the size of the file. As I am in San Luis Obispo on another matter today and tomorrrow is a furlough day for the sate, I will likely be unable to obtain assistance from our Info Tech people to view the files until Monday (2/9). Fourth, the late, voluminous filing presents an extreme and extraordinary prejudice to the Proecution Team in that we are pressed at this late date to review Moritz' voluminous filing with very little time. Fifth, Moritz has failed to explain not only why this late filling is justified, but he has also failed to provide even a brief description of the contents so that we could determine whether or not spending the time to review would be worthwhile.

Under the circumstances, we can't help but speculate that this submittal is a thinly-veiled attempt to create a delay of the scheduled hearing by means of a massive, unexplained paper dump.

For these reasons, the Prosecution Team requests that the Advisory Team reject the filing for the reasons cited above unless Moritz by noon today (2/5) provides a brief description of the contents of the late filing and provides compelling reasons why it must be considered. Even then, if the Advisory Team decides to allow the filing, it should require that Moritz pare down the submittal to its bare essential content and resubmit so that the Advisory Team, the Prosecution Team and the Board are not unreasonably burdened by spending inordinate amounts of time reviewing the submittal.

We regret having to do so because we appreciate that the Advisory Team is

busy working on all other items on the Board's agenda for February 11, but we do ask that a ruling on this be made as soon as possible.

Jorge A. Leon
Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
1001 I St., Sacramento, CA 95814
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Fax: (916) 341-5284
jleon@waterboards.ca.gov
>>> "Doug Simpson" <dsimpson@simpsonlawfirm.com> 02/04/09 10:42 PM >>>
THE SIMPSON LAW FIRM

A Professional Corporation

Dear Ms. Hagan and Mr. Robertus:

We are taking the opportunity to supplement earlier evidentiary submittals.

Given the 21-megabyte size of the document, RWQCB server settings, and at the suggestion of Bob Rossi of RWQCB, I am posting this document to YouSendIt.com. Each of you will receive an email from me via that site, indicating that the document is available to you.

Should this present a problem, please advise, and I will have a copy driven to RWQCB in the morning. Otherwise, I would appreciate confirmation that this submittal method is acceptable and that the document has been received. If possible, please contact me via cell phone, as I will be in L.A. tomorrow

in a mediation.

Thanks,

Doug Simpson

Doug Simpson

619-807-0196 (cell)

619-437-6900 ext. 201 (office direct line)

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www.simpsonlawfirm.com

From:	Catherine Hagan (George)
To:	Doug Simpson; Jorge Leon;
cc:	"LoriMoritz"; DrBill@ShareKids.com; "Brandon Vegter"; Christopher Means; John Robertus; Mike McCann;
Subject:	RE: Bill and Lori Moritz"s supplemental evidentiary submittal
Date:	Thursday, February 05, 2009 9:26:30 AM

Mr. Simpson,
The invitation to the parties was to provide legal argument to assist the Advisory Team in ruling on evidentiary objections offered by the parties.
Thus, the Moritzes were invited to submit argument opposing the Prosecution Team's objections to the Moritzes' evidence and vice versa. As you had already replied to the Prosecution Team's objections, I offered you the opportunity to supplement that reply. It was not an opportunity for the parties to supplement or renew their earlier objections to the other party's evidence, as those objections were due January 30 and that date was not extended. I also note that the Prosecution Team, by email on February 3 with a copy to you, withdrew its objections to the Moritzes evidence and provided legal argument against the Moritzes evidentiary objections. In order for me to discuss with the Chair whether any portion of the Moritzes' latest submittal should be allowed, please explain why the material could not have been submitted by January 23 as part of the Moritzes' deadline, or by the rebuttal evidence/evidentiary objections deadline of January 30.

>>> "Doug Simpson" <dsimpson@simpsonlawfirm.com> 2/5/2009 8:54 AM
>>>
Dear Mr. Leon:

For reasons unknown to me, the advisory team allowed the parties a further opportunity to discuss evidentiary issues. We have done no more than the prosecution team by preparing a further document that we were invited to prepare. Surely the invitation was made to us both, not simply to the prosecution team?

The file size was large, but I now have saved it smaller. You should have no trouble receiving it in its 2-megabyte form. Having not seen the document, I cannot understand how you've judged that it is voluminous. Nor is that an objection that has any validity in the matter. The document that we were invited to provide should be received, made part of the administrative record, and considered.

Doug Simpson

-----Original Message-----
From: Jorge Leon [mailto:JLeon@waterboards.ca.gov]
Sent: Thursday, February 05, 2009 6:32 AM
To: dsimpson@simpsonlawfirm.com; Catherine Hagan (George); John Robertus
Cc: lfoster@mclex.com; DrBill@ShareKids.com; bvegter@simpsonlawfirm.com; Christopher Means; Mike McCann
Subject: Re: Bill and Lori Moritz's supplemental evidentiary submittal

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Thanks,

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Catherine George Hagan
Senior Staff Counsel
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State Water Resources Control Board
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****

9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Telephone: 858.467.2958
Facsimile: 858.571.6972

From:	Doug Simpson
To:	"Catherine Hagan (George)"; "John Robertus";
cc:	"Christopher Means"; "Jorge Leon"; "Mike McCann"; "DrBill@ShareKids.com"; "Lisa A. Foster"; "LoriMoritz"; "Brandon Vegter";
Subject:	The Moritzes" filing in response to RWQCB advisory team"s invitation
Date:	Thursday, February 05, 2009 3:20:00 PM

THE SIMPSON LAW FIRM

A Professional Corporation

Dear Ms. Hagan:

With all due respect, on Monday your invitation clearly offered both parties the opportunity, by February 5, to: (1) "submit any legal arguments concerning the evidentiary objections" and (2) "to supplement their earlier submitted reply." Moreover, the invitation offered to accept the filing via email.

We took you up on your invitation. After all, the RWQCB already had had the opportunity to respond to the Moritzes' evidentiary objection, because we served the Moritzes' objections on Thursday, January 29, whereas the Prosecution Team's objections were filed the following day, Friday, January 30. So offering the Moritzes the opportunity to respond appeared fair and entirely appropriate in the circumstances, even though this procedure was not prescribed in the original procedural rules.

Mr. Leon accepted your invitation on Tuesday, February 3. We emailed our document last night, then again this morning. The document consists of 12 double-spaced pages of argument, four photographs, and two pages of deposition excerpts. I have filed voluminous briefs in the past in many cases, but this is not a voluminous filing, or a "a massive, unexplained paper dump." It simply is directed at the prosecution team's arguments concerning hearsay, and concerning plain-view arguments made on January 30 and February 3. The filing was timely, and was in compliance with your invitation because it falls with the ambit of your invitation to "submit any legal arguments concerning the evidentiary objections" and (2) "to supplement their earlier submitted reply." Below is the invitation, to which we responded.

To the Parties:

On January 30, both parties in the above matter submitted rebuttal argument and evidentiary objections. The Parties must submit any legal arguments concerning the evidentiary objections they wish the Advisory Team to consider not later than 12:00 p.m. on Thursday, February 5. They may submit the argument by email. I note that on January 30, the Moritzes also submitted a reply to the Prosecution Team's evidentiary objections. If they wish to supplement their earlier submitted reply, they may do so within this time frame.

Thank you.

Mr. Leon objected, but did so perhaps because of the file-megabyte size, without having first had the opportunity to actually see the document. Later this morning, he conceded that the document might indeed be appropriate, but that he did not know because could not see it with his Blackberry. I cannot speak for him, but I would expect any court to view the document we filed a proper reply.

As for technological issues, I don't know the limitations of Blackberries. I use a laptop when I travel, as I did this morning, which enabled me to resubmit the document sent to you last night. I was able to reduce the document's megabyte size, to a less shocking 2 megabytes, without changing the content.

I didn't view your invitation as being conditioned on whether Mr. Leon was either in San Luis Obispo or was on work furlough, or whether the filing date was convenient to my schedule. We simply prepared a document consisting of legal arguments – "any legal arguments" – and supplementing our earlier-filed reply, as both parties were invited to do.

RWQCB's prosecution team submitted whatever it believed proper on February 3, and without any protest. We believe that in fairness the Moritzes' document sent today should likewise be made part of the record and considered in its entirety.

Doug Simpson

Doug Simpson
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Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board
San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties
Recipient of the 2004 Environmental Award for Outstanding Achievement from U.S. EPA

Arnold Schwarzenegger
Governor

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http://www.waterboards.ca.gov/sandiego

February 10, 2009

VIA E-MAIL AND U.S. MAIL

Douglas Simpson, Esq.
The Simpson Law Firm, P. C.
1224 10th Street, Suite 201
Coronado, CA 92118

Jorge Leon
Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement
1001 I Street, 16th Floor
Sacramento, CA 95814

Dear Messrs. Simpson and Leon:

TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2008-0152, DR. BILL MORITZ AND LORI MORITZ, CITY OF POWAY, COUNTY OF SAN DIEGO, RULING ON EVIDENTIARY OBJECTIONS

This correspondence addresses the Evidentiary Objections submitted by the Moritzes on January 29 and February 5, 2009. The Evidentiary Objections submitted by the Prosecution Team on January 30, 2009 were withdrawn.

Contrary to the Moritzes' interpretation set forth in numerous e-mail communications on February 5, 2009, the Moritzes' February 5 submittal titled "William and Lori Moritz's Third Evidentiary Objections Submittal for Consideration by RWQCB as to CAO R9-2008-0152" is outside of the scope of the Advisory Team's invitation and constitutes a late effort to augment the Moritzes' earlier-filed objections. I note that the earlier-filed objections raise the same legal issues that were greatly expanded upon in the February 5 submittal. As the Prosecution Team clearly understood in its February 3 reply, the Advisory Team's invitation was for the purpose of elicitng legal argument from each party on the merits of the other party's previously submitted objections. Nonetheless, even considering the arguments raised in both the Moritzes' timely and untimely evidentiary objections submittals, the Advisory Team has consulted with the Chair and he has overruled your objections.

First, the Moritzes argue that any hearsay evidence submitted by the Prosecution Team must be excluded. That is incorrect. Adjudicative proceedings before the Regional Board are conducted in accordance with the provisions and rules of evidence in Government Code section 11513, which permits introduction of hearsay evidence for limited purposes. Consistent with section 11513, the Prosecution Team has stated that it will support any hearsay evidence with non-hearsay evidence. None of the evidence proposed by the Prosecution Team will be excluded on the basis that it is hearsay.

Second, the Moritzes argue, but have not established, that the inspections by the City of Poway were illegal. Nor have they established that the circumstances of the Regional Board staff inspection of June 9, 2008 required a warrant. In general, the Regional Board

staff may not inspect a person's property without permission or a warrant to inspect, if permission is denied. See Water Code section 13267, subdivision (c). While a person has a reasonable expectation of privacy in his yard based on interpretations of the Fourth Amendment to the U.S. Constitution, there are exceptions where the yard can be seen from a public vantage point or a location where the inspector has a right to be.[1] See *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986). The inspector would have the right to be in a public areas or a private area where there is implied consent. See *City and County of San Francisco v. City Inv. Corp,* 15 Cal.App.3d 1031, 1039.

In this case, the Regional Board staff observed the activities in the Moritzes' yard from a private road leading past the Moritzes' property. The Regional Board staff was on the private road apparently with the permission of a neighbor. The Moritzes have impliedly consented to access to the private road. If the road were only their road alone, there might be a greater expectation of privacy, but it appears that they share the road with neighbors. The Moritzes would reasonably have the expectation that his neighbors would allow others to use the road and the activities were easily viewable from the private road.

Even if it were established that Regional Board staff were trespassing on another person's property when it observed the Moritzes' property, the information obtained through the observation would still be admissible for purposes of supporting a cleanup and abatement order.

The Fourth Amendment to the Constitution protects against unreasonable searches and seizures. In *People v. Terry*, 70 Cal.2d 410 (Cal.Sup.Ct) (1969), the court ruled in a death penalty case that obtaining evidence when trespassing did not violate the Fourth Amendment. The police officers obtained evidence while entering the garage of an apartment building. In the Moritz matter, if the Regional Board staff had entered the private road, which is a common to all the residents without permission, it would be similar to the officers in this case entering the garage of an apartment building.[2]

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[1] The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E.g.,* **1813*United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 1085-1086, 75 L.Ed.2d 55 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra*, 389 U.S., at 351, 88 S.Ct., at 511.

[2] The Fourth Amendment of the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." This amendment, made applicable to the states by the Fourteenth Amendment (*Mapp v. Ohio*, 367 U.S. 643, 655- 657 [66 L.Ed.2d 1081, 1089-1091, 81 S.Ct. 1684]) "protects individual privacy against certain kinds of governmental intrusion," although "its protections go further, and often have nothing to do with privacy at all." (*Katz v. United States*, 389 U.S. 347, 350 [19 L.Ed.2d 576, 581, 88 S.Ct. 507].) FN11 The prohibition in the amendment is

The Moritzes have not established that the City of Poway engaged in a warrantless search. The Prosecution Team's inspection was not a warrantless search and the inspection report will not be excluded.

Sincerely,

Catherine George Hagan

Catherine George Hagan
Senior Staff Counsel

---

gainst unreasonable searches and seizures, not trespasses.

Police officers in the performance of their duties may, without violating the Constitution, peaceably enter upon the common hallway of an apartment building without a warrant or express permission to do so. (*United States v. St. Clair,* 240 F.Supp. 338, 340; *United States v. Buchner,* 164 F.Supp. 836 [affd. per curiam 268 F.2d 891;cert. den. 359 U.S. 908 (3 L.Ed.2d 573, 79 S.Ct. 584)]; *People v. Seals,* 263 Cal.App.2d 575, 576 et seq. [69 Cal.Rptr. 861]; cf. *United States v. Miguel,* 340 F.2d 812 [cert. den. 382 U.S. 859 (15 L.Ed.2d 97, 86 S.Ct. 116)]; *United States v. Lewis,* 227 F.Supp. 433, 436-437.)Even if such an entry constitutes a trespass, a simple trespass without more does not invalidate a subsequent search and seizure. (*United States v. Buchner, supra,* 164 F.Supp. 836, 839; *People v. Seals,* 263 Cal.App.2d 575, 576 et seq.; see *Teasley v. United States,* 292 F.2d 460, 464; see also *People v. Willard,* 238 Cal.App.2d 292, 298 et seq. [47 Cal.Rptr. 734]; and *Giacona v. United States,* 257 F.2d 450, 456, [cert. den. 358 U.S. 873 (3 L.Ed.2d 104, 79 S.Ct. 113)],***428** [minor trespass, not involving entry of building, does not render observations an unreasonable search].

In the *Terry* case, the garage, used in common by the tenants of the apartment building, is similar in nature to a common hallway of an apartment building. The officers apparently entered the garage without force. The defendant's car was parked in the garage and the marijuana was in plain sight on an open ashtray inside the car. Any expectation by defendant of privacy as to objects in plain sight in the car would have been unreasonable, and no constitutionally protected right of privacy was violated when the officers looked through the window of the car.